Supreme Court of the Hawaiian Islands.

IN THE MATTER OF THE APPLICATION OF CHOCK KEM FOR A WRIT OF MANDAMUS TO HIS EX. JONATHAN AUSTIN, MINISTER OF FOREIGN AFFAIRS.

BEFORE M'CULLY, J., IN CHAMBERS, MAY 5, 1890.

Sec. 6 of Chap. 28 of the Laws of 1887 requires the Minister of Foreign Affairs to issue a permit to land to a Chinese person coming within the descriptions in that section, although a permit might have been procured from a Hawaiian Consul at the port of embarkation.

This duty of the Minister being ministerial the performance of it may be enforced by writ of mandamus.

The proceedings were by a petition upon which an alternative writ was issued, whereupon the respondent made a return with exhibits. Upon these papers the case was argued and submitted.

The petition is as follows:

"Your petitioner Chock Kem, respectfully represents unto Your Honor the following:

"1. That he was born in China, but has resided for the past six years in Honolulu, Oahu, and his occupation is managing clerk for the firm of Kwong Hip Lung & Co., of said Honolulu.

"2. That on the to wit, 27th day of April, 1890, there arrived in the port of Honolulu, on the ship Tillie Baker, one Ah Sung, a Chinese boy, the son of petitioner; said Ah Sung having been born in the state or distric of Hong Sau, in the province of Quong Tun, China, in the fourth year of the reign of Kon Si, the second moon, and the fifth day, and is consequently thirteen years of age.

"3. That Jonathan Austin, Esq., is His Majesty's Minister of Foreign Affairs, and as such, was applied to to by your petitioner on the to wit, 29th day of April, 1890, to grant a permit to the said Ah Sung to land from the said ship, and enter the Kingdom, under Section 6, Chapter 28, Laws of 1887.

"4. That as your petitioner is informed and believes, the said Ah Sung is entitled under the said law to a permit to enter the Kingdom; and that as petitioner is also informed and believes it is the duty of the said Minister to grant such permit.

"5. But petitioner says that the said Minister has refused and still refuses to grant such permit as aforesaid, contrary to the provisions of said above-mentioned law.

"6. And petitioner is informed and believes that the ordinary forms of law make no provision for remedying the wrong inflicted upon him by the said Minister as aforesaid.

"7. Wherefore your petitioner prays that a writ of mandamus may issue out of and under the seal of the honorable Court, directed to the said Jonathan Austin, Minister of Foreign Affairs, commanding and enjoining him to grant a permit to your petitioner's said son, Ah Sung, to enter the Kingdom, or to show cause before this Court, at a day and hour to be fixed why he should not grant said permit; and that petitioner may have such other relief as justice demands, including the costs of these proceedings."

The return with exhibits is as follows:

"And now comes Jonathan Austin, Minister of Foreign Affairs, as aforesaid, and, for return to the alternative writ of mandamus issued to him, in the above entitled cause, on the 30th day of April ult. respectfully represents unto the Court as follows:

"1. He admits the arrival at Honolulu, of the vessel Tillie Baker, and the presence, on said vessel, of the boy, Ah Sung, as stated in the petition and writ herein.

"2. He admits that he has refused to grant a permit for the said Ah Sung to enter the Kingdom, and still refuses so to do.

"3. He alleges that the application to this respondent, to issue such permit was conveyed in a letter, a copy of which is hereto annexed, marked exhibit "A," and the reasons for respondent's refusal to issue the same were, and are those set forth in respondent's reply to said application contained in a letter from respondent to said relator, a copy of which is hereto annexed marked exhibit 'B.'

"4. Wherefore the respondent submits to the Court that, if said Ah Sung was entitled to a permit to enter this Kingdom, he could, and should have obtained such permit from His Majesty's Consul-General, in Hongkong, and that, not having so obtained said permit, there is no obligation upon the respondent, at this time, to issue such permit."

"EXHIBIT 'A.,'

"HONOLULU, April 29, 1890.

"To His Excellency Jonathan Austin,
H. M. Minister of Foreign Affairs.

"Sir: The undersigned Chock Kem, Managing clerk of the firm of Kwong Hip Lung on Hotel street, Honolulu, Oahu, H. I., who has been resident in the Hawaiian Islands for the past (6) six years, hereby respectfully requests a permit for his son Ah Sung to enter into the Kingdom. Said Ah Sung is now on board the Am. ship 'Tillie Baker' lying in Honolulu harbor having arrived from Hongkong on said ship on to wit, the 27th instant. This application is made under Section 6, Chapter XXVIII., Laws of 1887.

"The said Ah Sung was born in the town of Hong Sau, Province of Quong Tun, in China in the 4th year of Kong See Emperor, on the 5th day of the second moon, and is consequently 13 years of age. He has been in China with his relatives in order to receive his education, and it is now the wish of the undersigned that he join his family as aforesaid.

"I remain,

"Your obedient servant,

"(Signed.) CHOCK KEM.

"Executed in the presence of C. S. Akim.

"EXHIBIT 'B.'

"DEPARTMENT OF FOREIGN AFFAIRS, }
"HONOLULU, April 29, 1890. }

"Mr. Chock Kem, Honolulu.

"Sir: I have the honor to acknowledge the receipt of your letter of this date making application for permit for your son Ah Sung to enter the Kingdom.

"In reply, I beg to state that if Ah Sung is entitled to a permit he should present proof of that fact to His Majesty's Consul-General at Hongkong. Since he was born in China it should be a simple matter to produce at Hongkong the record and proof of the date and place of his birth while no record showing those facts is available in this Kingdom.

"I have the honor to be, Sir,

"Your most obed't servant,

"[Signed] JONATHAN AUSTIN,
Minister of Foreign Affairs."

The Statute upon which this case is based is Section 6 of the Act to Regulate Chinese Immigration, Ch. 28 of the Laws of 1887, viz:

SECTION 6.

"Permits to enter the Kingdom shall also be granted by the Minister of Foreign Affairs, His Majesty's Consuls-General at Hongkong and San Francisco, and His Majesty's Consul or Commercial Agent at Shanghae, to any Chinese woman of good moral character, or to the wives of Chinese residents in the Kingdom, and to Chinese children under fourteen years of age whose parents are residing in the Kingdom, or who accompany their parents, and to families consisting of parents and children as aforesaid; no charge will be made for permits granted hereunder."

By the Court.

Upon the pleadings and the Statute what is the petitioner entitled to on behalf of the Chinaman Ah Sung, now detained on board the ship "Tillie Baker"? The petition alleges that he having been born in the fourth year of the reign of Kon Si, the second moon and the fifth day, is consequently thirteen years of age now. This allegation is not traversed in the return nor is it as being neither admitted nor denied, thrown upon the petitioner to prove it, and is therefore taken to be true. But it is said for the respondent that the Court can take no notice of a date fixed by the Calendar of the Emperor of China. It is true, and I do not—I omit the "consequently" and take the sworn statement of the father that his son is thirteen years of age. But it is further said that the allegation that he is thirteen years old is not equivalent to saying that he is "under fourteen years of age." The form of words used does not satisfy me, at the same time the declaration that he is thirteen years of age imports in common usage that he is not fourteen, and can only be used seriously in any other sense but with a direct intention to deceive—I will not presume that. The petitioner swears that he is the father of Ah Sung, and that he is a resident in the kingdom, and this is not traversed. But it is said for the respondent that it is "parents," that is both the father and mother of a child, resident here, to whom the statute applies, and that the conditions are not complete when, so far as appears in this case, there is only a father resident here. I do not read the statute as requiring this construction. It speaks of "wives of Chinese residents," when it is presumable that it intended the wife of a Chinese resident, and of "children," when we must suppose a child is intended, in a case where there is only one child to be permitted to land. So "parents" is used in the plural as applying to plural instance and not prescribing that there shall be two parents in a single instance. Moreover, it is the father who makes the application in this case, the head of the family. The *ratio legis*, the reason or purpose of the law is evidently to promote the union or re-union of the family, and the construction here given is in consonance with that reason. Ah Sung, coming within the prescriptions of the age and of having parents resident here, the reason assigned by the respondent, in his letter above, for refusing a permit is to be considered, namely, that he could have obtained a permit from His Majesty's Consul-General at Hongkong. But the Statute equally empowers the respondent to issue a permit. He assigns the ground that at Hongkong the record of his birth might be produced. It does not appear that there are official records kept in the various provinces of China of the dates of birth of children, or that a certificate from such record could be produced before the Consul-General at Hongkong, and the Statute does not prescribe that kind of proof and exclude the proof of the oath of the parent, which is given in this case. If the Statute gives the power to issue the permit to the Minister of Foreign Affairs, as well as to consuls abroad, why should he not exercise it? Why might not the Consul-General with equal reason decline to give the permit because another could grant it, to wit, the Minister of Foreign Affairs, and with the reason besides that as the boy was proceeding to join his father at Honolulu, his father could better show there that he was a Chinese resident of this kingdom and that his son was under fourteen years of age? I think there can be but one answer to these questions; the answer in favor of the petitioner.

What is asked of the Minister this respondent, to do, is a ministerial act, pure and simple. There is no discretion vested in him to give or refuse the permit when the subject of the application comes within the description of the law. It follows, therefore, upon well-settled principles that it is within the jurisdiction of the Court to issue its mandate that the act be performed.

If this intimation shall be sufficient, the writ of mandamus absolute will not be issued to-day.

3:45 P. M., May 5, 1890.

V. V. Ashford for petitioner; C. W. Ashford, Attorney-General, for respondent.

NOTE. — The respondent and the Attorney-General immediately said that having obtained the construction of the law, it would be unnecessary for the petitioner to proceed further.

Supreme Court, Hawaiian Islands, April Term, 1890.

G. W. C. JONES *vs.* SAM'L NORRIS.

APPEAL FROM CHIEF JUSTICE JUDD.

JUDD, C. J., M'CULLY J., BICKERTON, J., DOLE, J., ABSENT.

An estate having been sold on the 21st day of September, with a covenant against incumbrances, and with no express agreement concerning the payment of the taxes.

HELD, that the taxes became a fixed charge against the owner of the property on the first of July preceding, although the valuation of the property had not then been determined by the assessor;

Held, that when a case has been tried by a justice of the Court with jury waived the Court in banco will not on a bill of exceptions review his findings of facts, otherwise than it would the verdict of the jury.

OPINION OF THE COURT BY M'CULLY, J.

The case, assumpsit, was heard by Chief Justice Judd, sitting with jury waived. He found in favor of the plaintiff for a certain amount under his claims. The defendant excepts to the findings in the fact and law, by the Justice hearing the case.

The exception to the finding that the defendant should pay the taxes involves a question of law which we will examine first. The language of the Court upon this item of claim is this: "I think the defendant should pay the taxes advanced by the plaintiff. The taxes were assessed as of the 1st of July, but they were not payable until the 15th of November, about two months after the sale. Taxes are an annual charge upon property by virtue of law and they should be paid by the defendant as the owner of the property on the same principle that he must pay the annual rents accruing after the sale."

The tax referred to is the real estate and chattel taxes upon the "Kahuku Ranch." This property comprises land and buildings, cattle and horses and other live stock, with grazing, agricultural and dairy tools and implements. It was sold by plaintiff to defendant September 21, 1888, by a deed of warranty and covenant that the premises were free and clear of all incumbrances.

The plaintiff continued to reside on the premises demised for some months after the sale, by an amicable agreement of the parties, the defendant being absent in Honolulu or in California, and during this time the plaintiff, among other payments claimed to be made on defendant's account, paid the taxes.

The contention of the plaintiff is that the tax was not due, and a fixed charge or lien on the estate sold until after the date of sale, whereby it was not an incumbrance which the plaintiff was bound to pay. The defendant to the contrary.

The Statutes which relate to the assessment and payment of taxes as they stood at the time of the sale, in respect to dates, are in substance as follows:

The returns by owners of real and of personal property were to be made as of the first of July. C. L. p. 123.

The assessor was appointed on or before the first of July, and it was his duty to notify residents of his district to make their returns to him at a designated place and on dates in the month of July.

The assessor is required to have his tax list open for inspection from September 20th to October 1st, and to give public notice of the time and place or places for this, and persons dissatisfied with the taxation may then take their appeals.

The Courts of tax appeal sit at appointed times in the month of October.

The tax collector calls for the payment of taxes in the month of November and December, not later than the 15th of December, after which date he may levy for unpaid taxes on sufficient of the goods and chattle, or may sue for them.

This Court has held in the Hilo Sugar Company vs. The Minister of Finance, 7 Haw. 665, that property within the Kingdom on any part of the first of July was taxable to the owner, although it was then on ship board and during that day was transported abroad, affirming the case of Brewer & Co. vs. Tax Collector 6 Haw. 554. No stronger case could be presented of the appliation of the liability which attaches on the first day of July. Our Statutes make no difference between real and personal property in respect to the charge of the tax being upon the owner, at the date selected for the falling of the tax, the first of July, although the payment of the tax upon real estate is secured notwithstanding the sale or transfer of it by attaching a liability to the real estate itself. The debt of the tax is still upon the owner. The act of assessment must necessarily be subsequent to the day when the ownership is fixed. The obligation is perfect at that time to pay an amount which shall be determined by the assessor, subject to the action of the Appeal Board. The assessor has not to ascertain who may be the owners of the property of his district at any other date, or at the date of the completion of his assessment list on or before the 15th of September. If that were the case what would be the force of the provision that the ownership shall be reported as it stood on the first of July? There is no provision of the Statute for reporting to the assesror the changes in ownership which may be made during the time of making up the assessments, and he is not required to find them out. We have observed above that real and personal property are treated alike. For an illustration of the confusion which would arise in following a fugitive ownership, take the case of a thousand dollars cash in the possession of A. on the first of July and instead of taxing him for that whenever the assessment is completed, it has to be taxed in the hands of those to whom it has passed subsequently and may be at the date when the assessment of different individuals may be entered. But our law imposes no such difficulty. The work of the assessor relates to the first of July and the charge is fixed on that day whatever may be the subsequent date when the assessor makes up the assessment of individuals and completes the entire district.

In the case before us the tax was upon both real and personal property. It cannot well be contended, and it has not been, that the tax on the personal property does not adhere to the owner of it July 1st. We see no reason to support the proposition that that portion of the tax which was on the real estate was fixed at any subsequent date. It cannot be supported by the provision that in case of transfer of real estate the tax may be held as a lien upon it, for that is merely an additional or cumulative remedy beyond the provision that levy may be made upon the goods and chattels for the taxes due by an individual, whether upon real or personal property. The tax-collector looks to the plaintiff personally for the taxes on the property owned or possessed by him on the first of July, and may sue him, or levy upon his goods and chattels, or for that portion of the tax which is laid on the real estate he may attach it even after its sale. The covenent in the deed protects the purchaser, if this latter remedy is pursued.

In support of the views above expressed we may cite the general observation made in Hilliard on Taxation, p. 171: "Assessments must be made against the party who owns the property on the day in each year in which the assessment is by law to commence, quoting from State vs. Hardin 34, N. J. 80. The practical effects of a different construction were confusion in the transfers of property, hindrance in the ordinary transactions of business, and difficulty in rendering a full and true account of rateable property by the owners thereof whenever the assessors might call for it."

The findings of the Chief Justice in respect to the other items held to be made on the defendants' account are all dependent on questions of fact, and we consider that must stand unless set aside for such reasons as would set aside the verdict of a jury.

As we reverse the finding of the Chief Justice which made the defendant liable for the taxes, this amount, $367.04, must be subtracted from the sum $667.36½ for which the plaintiff recovered judgment below, leaving the sum of $300.32½, for which sum with costs and commissions the plaintiff may take judgment.

W. O. Smith for plaintiff; F. M. Hatch for defendant.

Honolulu, May 5th, 1890.